

This Opinion is not a
Precedent of the TTAB

Mailed: September 24, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Southern Seed & Feed, LLC

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Serial No. 87424601

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Jeremy A. Smith of Lanier Ford Shaver & Payne PC,
for Southern Seed & Feed, LLC.

Daniel F. Capshaw, Trademark Examining Attorney, Law Office 110,
Chris A. F. Pedersen, Managing Attorney.

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Before Zervas, Bergsman and Greenbaum,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Southern Seed & Feed, LLC (“Applicant”) seeks registration on the Principal Register of the proposed mark TRIPLE CLEANED CORN (in standard characters) for

“animal feed of corn” in International Class 31.¹ Applicant claims acquired distinctiveness of the entire mark under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), and has disclaimed the term CORN.²

The Examining Attorney refused registration of the proposed mark under Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§1051, 1052, 1127, finding the proposed mark is generic. In the alternative, the Examining Attorney refused registration of the proposed mark under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1), finding the proposed mark is merely descriptive of Applicant’s goods and that Applicant has not made a sufficient showing of acquired distinctiveness under Section 2(f).

After the July 11, 2019 Final Office Action, Applicant timely appealed and submitted a request for reconsideration.³ The Board suspended the appeal and remanded the application to the Examining Attorney for consideration of the request for reconsideration. The Examining Attorney denied the request for reconsideration, and the Board resumed the appeal. Applicant and the Examining Attorney have filed briefs.

We affirm the refusals to register Applicant’s proposed mark.

1. Genericness

A generic term “is the common descriptive name of a class of goods or services.” *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 (Fed. Cir. 2015) (quoting *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*,

¹ Application Serial No. 87424601 was filed on April 25, 2017, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming first use anywhere and first use in commerce on August 30, 2002.

² January 10, 2020 Req. for Recon., 4 TTABVUE 3.

³ 4 TTABVUE.

782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)). Because generic terms “are by definition incapable of indicating a particular source of the goods or services,” they cannot be registered as trademarks. *Id.* (quoting *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001)). “The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question.” *Id.* (quoting *Marvin Ginn*, 228 USPQ at 530).

Making this determination “involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered ... understood by the relevant public primarily to refer to that genus of goods or services?” *Marvin Ginn*, 228 USPQ at 530. *See also Princeton Vanguard*, 114 USPQ2d at 1829 (“there is only one legal standard for genericness: the two-part test set forth in *Marvin Ginn*”). “An inquiry into the public’s understanding of a mark requires consideration of the mark as a whole.” *Id.* at 1831 (quoting *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1421 (Fed. Cir. 2005)).

“[A] term [may be] generic if the relevant public understands the term to refer to part of the claimed genus of goods or services, even if the public does not understand the term to refer to the broad genus as a whole.” *In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1638 (Fed. Cir. 2016).⁴ A generic term may refer to a category

⁴ In *In re Cordua Rests.*, 118 USPQ2d 1638, the Federal Circuit explained:

[A] term is generic if the relevant public understands the term to refer to part of the claimed genus of goods or services, even if the public does not understand the term to refer to the broad genus as a whole. Thus, the term “pizzeria” would be generic for

of products. *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018) (“We made clear [in *Cordua*] that ‘[t]here is no logical reason to treat differently a term that is generic of a category or class of products where some but not all of the goods identified in an application fall within that category.’ [*Cordua*, 118 USPQ2d] at 605 (quoting *In re Analog Devices, Inc.*, [6 USPQ2d 1808, 1810 (TTAB 1988)]).”). See also *Int’l Dairy Foods Ass’n v. Interprofession du Gruyère*, 2020 USPQ2d 10892, * 24 (TTAB 2020) (GRUYERE is “a designation that primarily refers to a category within the genus of cheese that can come from anywhere.”).

In an ex parte appeal, the USPTO has the burden of establishing by clear evidence that a mark is generic and, thus, unregistrable. *In re Hotels.com*, 573 F.3d 1300, 91 USPQ2d 1532, 1533 (Fed. Cir. 2009); *In re Gould Paper Corp.*, 834 F.2d 1017, 5

restaurant services, even though the public understands the term to refer to a particular sub-group or type of restaurant rather than to all restaurants. See, e.g., [*In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961 (Fed. Cir. 1985)] (affirming the TTAB’s determination that BUNDT is generic “for a type of ring cake”); *In re Analog Devices, Inc.*, 6 USPQ2d 1808, 1810, 1988 WL 252496, at *3 (TTAB 1988) (“There is no logical reason to treat differently a term that is generic of a category or class of products where some but not all of the goods identified in an application fall within that category.”), *aff’d*, 871 F.2d 1097 (Fed. Cir. 1989) (unpublished); see also *Otokoyama Co., Ltd. v. Wine of Japan Imp., Inc.*, 175 F.3d 266, 271 (2d Cir.1999) (“Generic words for sub-classifications or varieties of a good are [] ineligible for trademark protection.”). “A registration is properly refused if the word is the generic name of any of the goods or services for which registration is sought.” 2 McCarthy § 12:57. A “term need not refer to an entire broad species, like ‘cheese’ or ‘cake,’ in order to be found generic.” 1–2 Anne Gilson LaLonde, *Gilson on Trademarks* § 2.02[7][a] (2011).

USPQ2d 1110, 1111 (Fed. Cir. 1987); *In re Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141 (Fed. Cir. 1987).

a. The Genus of Goods

“[O]ur first task is to determine, based upon the evidence of record, the genus of Applicant’s goods” *In re ActiveVideo Networks, Inc.*, 111 USPQ2d 1581, 1600 (TTAB 2014). The genus of goods is often defined by the identification in the subject application. See *In re Meridian Rack & Pinion*, 114 USPQ2d 1462, 1463 (TTAB 2015) (citing *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991)).

Both Applicant and the Examining Attorney agree that the genus is “animal feed of corn.”⁵ We agree, and find the genus is defined by Applicant’s identification of goods, “animal feed of corn.”

b. The Relevant Purchasing Public’s Understanding of TRIPLE CLEANED CORN

We turn now to the second inquiry under *Marvin Ginn*, whether TRIPLE CLEANED CORN is understood by the relevant public primarily to refer to “animal feed of corn.”⁶ Any competent source, including dictionary excerpts, research databases, webpages, newspapers and other publications, may serve as evidence to show

⁵ Applicant’s brief at p. 4, 7 TTABVUE 5; Examining Attorney’s brief, 9 TTABVUE 5.

⁶ *Id.* at 9 TTABVUE 6. The webpage from Bryant Grain Company, Inc. explains under the heading “Re-Cleaned Grains” that “grains are processed over three layers of screens to remove foreign material larger than the grain (cobs, stems, etc.) and particles smaller than the grain (fines, etc.). Finally, the screen grain is passed through an air stream to further remove fines, light weight dust and chaff which may have rolled over the screens. The result is a clean, high quality grain product for your livestock mixing or feeding purposes.” August 8, 2018 Office Action, TSDR 5.

the relevant purchasing public's understanding of the wording at issue. *In re Reed Elsevier Props. Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007); *In re Merrill Lynch, Pierce, Fenner, & Smith*, 4 USPQ2d at 1143. Because the goods are used to feed deer and livestock, we find that the "relevant public" consists of those who hunt deer and possess livestock. *See* definition of "feed" from Merriam Webster's Dictionary, "food for livestock specifically : a mixture or preparation for feeding livestock."⁷

The Examining Attorney evidence includes the following:

Submitted with July 21, 2017 Office Action:

- Speer AG website offering "Speer Ag Triple Cleaned Corn" as feed for wildlife. TSDR 2-3.
- www.researchgate.net article entitled "Aflatoxin contamination in corn sold for wildlife feed in Texas" stating "Additionally, three metal and three polypropylene supplemental feeders were each filled with 45.4 kg of triple cleaned corn and placed in an open field" TSDR 4-9.
- B&G Seed Co. website describing its feed ingredients as including "liquid molasses," "triple cleaned corn" and "roasted soybeans." TSDR 12-15.
- West Feeds website offering "Triple Cleaned Corn" along with "Corn Chops," "Race Horse Oats," "Wheat Bran" and "Rice Bran." TSDR 18-23.
- J&J Bagging website stating "Delta Grown Grains is a premium line of Triple Cleaned Corn" TSDR 24.

⁷ <https://www.merriam-webster.com/dictionary/feed> (accessed September 9, 2020). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

- ACS Ark Country Store website offering “Triple-cleaned corn, chopped and screened.” TSDR 27-29.

Submitted with the August 8, 2018 Office Action:

- Fleming Outdoors website advertising “Triple Cleaned Corn 50 lb.” and stating:

“Don’t let trashy corn clog up your feeders this year. Our triple cleaned shell corn keeps feeders running smoothly ...”

TSDR 2-3.

- Facebook advertisement of Brooklyn Hardware & Feed advertising “Whole triple cleaned corn \$9.25/ 50 lb[.] bag.” TSDR 4.

- Bryant Grain Company website offering “Triple-cleaned corn, chopped and screened.” TSDR 5-6.

Submitted with the July 11, 2019 Office Action:

- Instagram page of Bluff Farm Supply with photographs of bags of “Triple Cleaned Corn”:



TSDR 4-5.

- Delta Grown Grains Facebook page advertising “WHO WANTS 50 BAGS OF DGG TRIPLE CLEANED CORN???”

stating “We all know the power of a 50 LB Bag of Triple Cleaned Corn,” and depicting:



TSDR 28-30.

- Greg’s Hay and Straw Facebook page advertising “Triple cleaned corn \$6.00 per bag.” TSDR 31-32, 37-38.
- The Pawnderosa Facebook page advertising: “NEW SHIPMENT OF TRIPLE CLEANED DEER CORN...” TSDR 33-36.
- Olsen Feed & Supply Facebook page advertising: “Triple cleaned corn \$6.75 50lb bag.” TSDR 39-43.

Applicant introduced evidence into the record with its January 10, 2020 request for reconsideration,⁸ including the following:

- Search results from the USPTO’s Trademark Electronic Search System (TESS) database for “triple cleaned corn” demonstrating “No TESS records were found to match the criteria of your query.”
- Declarations from eight of Applicant’s customers all stating, “The phrase TRIPLE CLEANED CORN is not a generic name for animal feed in my industry. I recognize the mark TRIPLE CLEANED CORN as identifying the goods coming from Southern Seed & Feed, LLC as opposed to other companies, and I recognize that the mark TRIPLE CLEANED CORN indicates Southern Seed & Feed, LLC is the source of the animal feed of corn branded as TRIPLE CLEANED CORN.”
- Declaration of Katie Koehn, Sales Manager for Applicant and an employee of Applicant for over ten years, who states

⁸ 4 TTABVUE 10-20.

“Our animal feed sold under the mark TRIPLE CLEANED CORN is one of our most successful products. Our TRIPLE CLEANED CORN products are sold throughout the United States to a large number of wholesale and retail customers. Since 2002, we have sold over 19 million units of our animal feed under the mark TRIPLE CLEANED CORN for a total revenue number of over \$62,000,000.00”; and “[t]he phrase TRIPLE CLEANED CORN is always used in a trademark sense to identify our goods as coming from Southern Seed & Feed, LLC. The vast sales made under the mark over such a long period of time are proof that the mark TRIPLE CLEANED CORN has acquired distinctiveness and should be registered with the USPTO on the Principal Register.”

Applicant argues that “triple cleaned” describes the cleaning process that Applicant’s goods go through; that if “triple cleaned corn” were a generic term it is likely that at least one other application or registration would include that term and appear on the USPTO database;⁹ that the declarations from longstanding customers of Applicant demonstrate recognition of Applicant’s proposed mark as a source indicator; that CORN is generic for Applicant’s goods; and that just like CASH MANAGEMENT

⁹ Applicant also argues that terms such as “corn” and “animal feed, namely, corn” are found repeatedly in goods descriptions for similar products in the USPTO database but offers no evidence in support. Applicant’s brief at p. 5, 7 TTABVUE 6. Without evidence, the argument is not persuasive. In any event, there can be more than one generic term for a particular genus of goods or services. Any term that the relevant public understands to refer to the genus is generic. *See In re 1800Mattress.com IP LLC*, 586 F.3d 1359, 92 USPQ2d 1682, 1685 (Fed. Cir. 2009); *see also In re Meridian Rack & Pinion*, 114 USPQ2d 1462 (TTAB 2015) (holding BUYAUTOPARTS.COM generic for on-line retail store services featuring auto parts after finding that the relevant members of the public use and understand the words “buy auto parts” as referring to the purchase and sale transactions that are the central focus of retail sales of auto parts and that third-party retailers advertise to their customers to “Buy Auto Parts Online.”).

ACCOUNT, TENNIS INDUSTRY ASSOCIATION, COUNTRY MUSIC ASSOCIATION, INSTANT MESSENGER, CHICKEN TENDERS, and HONEY BAKED HAM,¹⁰ Applicant's mark is not generic.¹¹

The Examining Attorney argues that the declarations do not rebut the evidence and arguments offered by the Examining Attorney on the question of genericness and that the argument regarding other marks found not to be generic is not persuasive in light of the evidence of record.

c. Analysis

We consider whether the term "TRIPLE CLEANED CORN," as a whole, is generic for the genus for "animal feed of corn." "An inquiry into the public's understanding of a mark requires consideration of the mark as a whole." *Princeton Vanguard*, 114 USPQ2d at 1831 (quoting *In re Steelbuilding.com*, 75 USPQ2d at 1421). "There is usually no one, single and exclusive generic name for a product. Any product may

¹⁰ Applicant cites to *In re Merrill Lynch, Pierce, Fenner & Smith*, 4 USPQ2d at 1141 (CASH MANAGEMENT ACCOUNT for "stock brokerage services, administration of money market fund services, and providing loans against securities services" held merely descriptive, rather than generic); *Burger King Corp. v. Pilgrim's Pride Corp.*, 705 F. Supp. 1522 (S.D. Fla. 1988) (CHICKEN TENDERS not generic for chicken products, but rather descriptive); *Schmidt v. Honeysweet Hams, Inc.*, 656 F. Supp. 92 (N.D. Ga. 1986) (HONEY BAKED HAM descriptive rather than generic for baked ham); *In re Tennis Indus. Ass'n*, 102 USPQ2d 1671 (TTAB 2012) (TENNIS INDUSTRY ASSOCIATION not generic for "association services, namely, promoting the interests of tennis facilities, tennis manufacturers, tennis retailers and tennis court contractors; providing market research services to track the economic vitality of the tennis industry,"); *In re Country Music Ass'n*, 100 USPQ2d 1824 (TTAB 2011) (COUNTRY MUSIC ASSOCIATION, with ASSOCIATION disclaimed, not generic for "association services, namely, promoting country music entertainers and the country music recording industry"); *In re Am. Online, Inc.*, 77 USPQ2d 1618 (TTAB 2006) (INSTANT MESSENGER not generic for telecommunications services and computer services related to providing real time text messages). Applicant's brief at pp. 6-7, 7 TTABVUE 7-8.

¹¹ Applicant's brief at pp. 5-6, 7 TTABVUE 6-7.

have many generic designations. Any one of those is incapable of trademark significance.” J. Thomas McCarthy, 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12:9 (5th ed. Sept. 2020 Update).

The record reflects that there are sellers of “animal feed of corn” who offer a product identified as “triple cleaned corn” and who sell such product under their own trademarks (for example, the Speer AG (offering “Speer AG Triple Cleaned Corn”), Fleming Outdoors, Brooklyn Hardware & Feed and Bryant Grain Company webpages listed above); that sellers of animal feed have labeled “triple cleaned corn” as a specific ingredient in feed (for example, B&G Seed Co. listing “triple cleaned corn” as an ingredient); and that sellers of animal feed have identified “triple cleaned corn” as a category of feed for sale along with other feed ingredients identified generically (for example, the West Feeds website also identifies “Wheat Bran” and “Rice Bran” as product categories). Further, the researchgate.net article uses “triple cleaned corn” to identify a category of animal feed.¹²

Applicant’s arguments and evidence do not persuade us that TRIPLE CLEANED CORN is not generic. The search results from the USPTO’s database provided by Applicant simply mean that the term did not show up in the database. The database is not intended to capture the names of all generic terms in use on all goods and services in the United States. Further, the declarations from the eight wholesale customers who state that TRIPLE CLEANED CORN is not a generic name for animal

¹² The probative value of the article is less than the other evidence identified above because it is not clear that it is directed to purchasers of “animal feed of corn.”

feed have little value because there is no indication in the record as to what portion of the purchasing public these individuals comprise. There are no statements from ultimate purchasers (such as ranchers) of “animal feed of corn.” In addition, the other marks noted by Applicant which were not found to be generic are not probative — each case must stand on its own merits. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to [applicant’s] application, the PTO’s allowance of such prior registrations does not bind the board or this court.”).

After carefully considering all of the arguments and evidence of record, we find that the proposed mark TRIPLE CLEANED CORN is understood by the relevant public primarily as the “common descriptive name” for a category of “animal feed of corn.” *Princeton Vanguard*, 114 USPQ2d at 1830. We find that purchasers of “animal feed of corn” understand the term “triple cleaned corn” as a designation that primarily refers to a category within the genus of “animal feed of corn,” *Marvin Ginn*, 228 USPQ at 530, and that the proposed mark is generic.

For completeness, we next consider the alternative refusal whether the merely descriptive term TRIPLE CLEANED CORN for “animal feed of corn” has acquired distinctiveness.¹³

¹³ By claiming acquired distinctiveness under Section 2(f), Applicant has conceded that TRIPLE CLEANED CORN is descriptive. *See Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988) (“Where, as here, an applicant seeks a registration based on acquired distinctiveness under Section 2(f), the statute accepts a lack of inherent distinctiveness as an established fact.”). Applicant bears the burden to establish acquired distinctiveness, *id.* at 1006, and the Examining Attorney contends that the Section 2(f) showing is insufficient.

2. Whether TRIPLE CLEANED CORN for “animal feed of corn” has acquired distinctiveness.

Before determining whether the proposed mark has acquired distinctiveness, we must determine the degree of descriptiveness of TRIPLE CLEANED CORN for “animal feed of corn.” See *Royal Crown Cola*, 127 USPQ2d at 1048 (“the Board must make an express finding regarding the degree of the mark’s descriptiveness on the scale ranging from generic to merely descriptive, and it must explain how its assessment of the evidentiary record reflects that finding.”); *Nazon v. Ghiorse*, 119 USPQ2d 1178, 1187 (TTAB 2016). “[A]pplicant’s burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning.” *Steelbuilding.com*, 75 USPQ2d at 1424. As the Board has explained:

[T]he greater the degree of descriptiveness, the greater the evidentiary burden on the user to establish acquired distinctiveness. The sufficiency of the evidence offered to prove acquired distinctiveness should be evaluated in light of the nature of the designation. Highly descriptive terms, for example, are less likely to be perceived as trademarks and more likely to be useful to competing sellers than are less descriptive terms. More substantial evidence of acquired distinctiveness thus will ordinarily be required to establish that such terms truly function as source-indicators.

In re Greenliant Sys. Ltd., 97 USPQ2d 1078, 1085 (TTAB 2010) (internal citations omitted); see also *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262, 1265 (Fed. Cir. 2015) (Board has discretion not to accept an applicant’s allegation of five years of substantially exclusive and continuous use as prima facie evidence of acquired distinctiveness when the proposed mark is “highly descriptive”); *In re Boston*

Beer Co. L.P., 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999) (“[C]onsidering the highly descriptive nature of the proposed mark, [Applicant] has not met its burden to show that the proposed mark has acquired secondary meaning.”).

Based on the evidence discussed above in connection with the genericness refusal, we find that each of the terms comprising Applicant’s mark, “Triple,” “Cleaned,” and “Corn” is highly descriptive of “animal feed of corn.” Moreover, when combined, the three terms do not evoke a non-descriptive commercial impression but retain their highly descriptive connotation of those goods. *See, e.g., Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (CORN THINS and RICE THINS are highly descriptive); *La. Fish Fry Prods.*, 116 USPQ2d at 1265; *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1851 (TTAB 2017) (MEDICAL EXTRUSION TECHNOLOGIES is highly descriptive of “polyurethanes in the form of sheets, films, pellets, granules, and tubes for use in the manufacture of medical devices, medical diagnostic devices, artificial vascular grafts, stents, pacemaker leads, artificial heart pump diaphragms, catheters, drug delivery devices, orthopedic and spinal implants, blood glucose monitors, and blood gas analyzers”); *In re Positec Grp. Ltd.*, 108 USPQ2d 1161, 1173 (TTAB 2013) (holding SUPERJAWS merely descriptive for tools).

In view of the foregoing, we find that Applicant’s proposed mark TRIPLE CLEANED CORN is highly descriptive of “animal feed of corn” under Section 2(e)(1). Clearly, no thought or imagination is required to immediately understand that animal feed of corn sold under the proposed mark TRIPLE CLEANED CORN is “a clean,

high quality grain product for your livestock mixing or feeding purposes.” Therefore, Applicant’s burden of establishing acquired distinctiveness under Section 2(f) is commensurately high. *See Steelbuilding.com*, 75 USPQ2d at 1424; *In re Bongrain Int’l Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990); *In re LC Trademarks, Inc.*, 121 USPQ2d 1197, 1199 (TTAB 2016); *In re Greenliant Sys. Ltd.*, 97 USPQ2d at 1085.

We now analyze Applicant’s evidence of acquired distinctiveness.

Applicant has submitted a statement that TRIPLE CLEANED CORN has acquired the distinctiveness necessary for registration on the Principal Register due to its substantially continuous and exclusive use for at least five years.¹⁴ Given the highly descriptive nature of the proposed TRIPLE CLEANED CORN mark, Applicant’s claim of continuous and exclusive use has little probative value in establishing that TRIPLE CLEANED CORN has acquired “the distinctiveness to be registrable on the Principal Register.” *Id. Cf. In re Guaranteed Rate, Inc.*, 2020 USPQ2d 10869, *4-6 (TTAB 2020) (applicant’s sales under of mark in excess of \$ 3.5 billion in last 11 fiscal years were “impressive,” but insufficient to show acquired distinctiveness even when coupled with other evidence). Accordingly, Applicant must rely on its “other evidence of acquired distinctiveness.” *Id.* at *2.

Turning to Applicant’s other evidence, we look to the following six factors:

- (1) association of the trade[mark] with a particular source by actual purchasers (typically measured by consumer¹⁵

¹⁴ December 12, 2018 Req. for Recon., TSDR 1.

¹⁵ Because consumers of “animal feed of corn” are likely animals, a better statement of the first factor is that secondary meaning can be measured by **purchasers** of “animal feed of

surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark All six factors are to be weighed together in determining the existence of secondary meaning.

Converse, Inc. v. Int'l Trade Comm'n, 907 F.3d 1361, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018).

Applicant offered no evidence under the third, fifth, and sixth *Converse* factors set forth above. Under the first factor, Applicant has submitted declarations from eight of its wholesale customers who each state that TRIPLE CLEANED CORN is not a generic name for animal feed. As mentioned above, these statements have little value because there is no indication in the record as to what portion of the purchasing public these individuals comprise. Also, there are no statements from the ultimate purchasers (such as ranchers) of “animal feed of corn.” Under the fourth factor, while Applicant’s sales suggest that it has achieved some success in the industry, Applicant’s declaration does not include any context about the industry, an explanation of what a “unit” consists of,¹⁶ or even the number of Applicant’s customers. The evidence under this factor therefore does not convince us that Applicant’s sales translate to purchaser recognition of TRIPLE CLEANED CORN - which is highly descriptive - as a trademark. *See In re Boston Beer*, 53 USPQ2d at 1058 (claim based on annual sales under the mark of approximately eighty-five million dollars, and annual advertising

corn.” We make clear that we are not discussing a survey of the animals which eat “animal feed of corn.”

¹⁶ Ms. Koehn states that Applicant has “sold over 19 million units of our animal feed under the mark TRIPLE CLEANED CORN” January 10, 2020 Req. for Recon., 4 TTABVUE 20.

expenditures in excess of ten million dollars, not sufficient to establish acquired distinctiveness in view of highly descriptive nature of the mark); *In re Melville Corp.*, 228 USPQ 970, 972 (TTAB 1986) (affirming the rejection of Section 2(f) claim, despite substantial advertising and revenue figures, given “the absence of any direct evidence that the purchasing public has come to recognize applicant’s slogan as a term identifying applicant’s services”). Even though under the second factor, Ms. Koehn has established 18 years of use, and Applicant has averred that such use has been substantially exclusive, we find that given the highly descriptive nature of Applicant’s proposed mark, Applicant’s evidence fails to establish acquired distinctiveness.

Decision: We affirm the refusal to register Applicant’s proposed mark on the ground that it is a generic designation of the identified goods, and in the alternative, we affirm the refusal to register on the ground that the mark is merely descriptive and without acquired distinctiveness.